ADVOCATES
FOR HIGHWAY
AND AUTO SAFETY

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Qualification of Drivers; Exemption Applications; Vision
Notice of Petitions and Intent to Grant Applications for Exemption
64 Fed. Reg. 27027, May 18, 1999

Advocates for Highway and Auto Safety (Advocates) files these comments in response to the Federal Highway Administration's (FHWA) notice of petitions and intent to grant applications for exemptions. Advocates does not comment on the merits of the individual applications or the specific qualifications of the 32 drivers. The agency has evaluated their applications and has already made a preliminary determination to grant the requested exemptions from the federal vision requirements.

More than 5,000 people are killed annually in truck-related crashes and recent data shows that the fatality total has been increasing in the last 5 years. In addition, many thousands of motor carriers are unrated by the Office of Motor Carriers and Highway Safety and timely information about operator records is poor. A number of crashes involving motor coaches has also hightened awareness regarding motor carrier and operator safety. In light of these and other concerns about safety, Advocates opposes FHWA's policy to grant waivers and exemptions from the federal motor carrier safety regulations including the driver qualification standards. Rather than granting exemptions, the agency should focus on scientific research that will establish whether current safety standards are appropriate or exceed the level of safety required to ensure safe motor carrier operations, and on research to develop a rational basis for conducting individualized testing. Granting exemptions based on substitute criteria does not ensure that deviations from the motor carrier safety standards will provide equivalent or greater levels of safety. More specifically, Advocates comments in order to 1) challenge the agency's reliance on conclusions drawn from the vision waiver program, 2) point out an important flaw in the criteria used by the agency for granting exemptions, 3) underscore the procedural inadequacy of this notice, and, 4) clarify the agency's misinterpretation of existing law.

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to

1) The FHWA's Notice of Petitions and Intent to Grant Applications for Exemption, in concluding that the 32 drivers' petitions for exemptions should be granted, relies, in part, on the purported results obtained from the ill conceived and illegal vision waiver program. According to the agency, "[t]hat monocular drivers in the waiver program demonstrated their ability to drive safely *supports a conclusion that other monocular drivers, with qualifications similar to those required by the waiver program, can also adapt to their vision deficiency and operate safely.*" 64 Fed. Reg. 27031 col. 2 (emphasis added). No such conclusion, however, is tenable since the vision waiver program did not use a valid research model nor did it produce results that could legitimately be applied to any drivers other than those participating in the original vision waiver program.

Indeed, FHWA was strongly criticized by a number of independent researchers and research organizations for ignoring basic principles of scientific methodology in its conduct of the vision waiver program. In the wake of the federal court decision that invalidated the vision waiver program, *Advocates for Highway and Auto Safety v. Federal Highway Administration,* 28 F. 3d 1288 (D.C. Cir. 1994), the agency admitted the inadequacy of the study methodology and design. "The FHWA recognizes that there were weaknesses in the waiver study design and believes that the waiver study has not produced, by itself, sufficient evidence upon which to develop new vision and diabetes standards." 61 Fed. Reg. 13338, 13340 (Mar. 26, 1996).[1] In fact, the data collected in the vision waiver program are worthless as scientific information and conclusions regarding the safety of any other individual driver or group of drivers who did not participate in the vision waiver program are neither credible nor scientifically valid. The agency cannot extrapolate from the experience of drivers in the vision waiver program to other vision impaired drivers who did not participate in the program. This point was made repeatedly to the agency in comments to the numerous dockets spawned by the agency's determination to grant vision waivers. It was made quite clear at the time the agency undertook to grant waivers to drivers in the vision waiver program that the data accumulated in that program could not be used to serve any other purpose. That data collected in that program has been comprehensively repudiated as a basis for drawing any conclusions about non-participant drivers. FHWA, therefore, is obligated to re-evaluate the merits of the petitions, and reconsider its preliminary determination to grant the exemption petitions, without any reliance on, or reference to, the experience of the drivers who participated in the vision waiver program.

2) In determining whether to grant or deny exemption petitions, FHWA uses as a criterion the applicants' previous three-year driving record immediately preceding the request.

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[1] *See also Qualification of Drivers; Vision Deficiencies; Waivers -- Notice of Final Determination and change in research plan*, 59 Fed. Reg. 59386, 59389 (Nov. 17, 1994) ("The agency believes that the observations made by the Advocates, the ATA, the IIHS and others regarding flaws in the current research method have merit").

In each of the 32 applicants' driving records, FHWA cites the prior three-year traffic violation and accident record as part of the basis for its "preliminary" determination to grant the requested exemption. In so doing, FHWA ignores federal motor carrier safety standards which require that operators have no conviction for certain disqualifying offenses for a period of 10 years, including repeat disqualifications for convictions for violating out of service orders, for violating the requirements for transporting hazardous materials required to be placarded pursuant to the Hazardous Materials Transportation Act, and for violating the additional rules for operating commercial vehicles designed to transport eight or more passengers. 49 CFR §§ 383 .5 1, 391.15. Under federal safety regulations, disqualification for second and third violations are based on a lo-year driver history. 49 C .F.R. §§ 383. Thus, while drivers who are not granted exemptions are subject to the lo-year requirement for second and third disqualifying offenses, drivers who are granted exemptions from the federal vision standard are also exempt from reporting convictions for disqualifying offenses that took place more than 3 years prior to the application for exemption. The recent rash of motor coach crashes should be sufficient warning to the agency that the examination of driver records, especially those of drivers seeking an exemption, should not be truncated to only the three years prior to the exemption request. The three-year driving record alone is not a sufficient basis for granting exemptions. FHWA has a clear legal obligation, and a responsibility to public safety, to confirm the status of the drivers record of an applicant for exemption, including whether the applicant has one or more convictions for disqualifying offenses within the last 10 years. The record presented by the agency in this notice is incomplete in this regard and FHWA must verify that applicants for exemptions comply with all requirements in federal statutes and regulations.

3) Advocates also objects to FHWA issuing this notice requesting comments only subsequent to the agency having already made "preliminary" determinations to grant the exemptions. This is not truly a fair and unbiased attempt to solicit comment and views on the application for these exemptions. Rather, like an interim final rule in which the agency has already made its decision, the agency has predetermined its view of the merits prior to soliciting and evaluating public comment on the petitions. This procedure places an undue burden on the public and the raises the evidentiary bar for those opposed to the agency's "preliminary" determination. Although the agency may claim that the determination is only an initial determination on the merits, it is evident that the agency is predisposed to grant such petitions and has already determined the outcome without awaiting public comment.

The procedure used by FHWA is objectionable under the requirements specified in 49 U.S.C. § 31315, and the dictates of the Administrative Procedures Act, 5 U.S.C. § 553. The statutory language governing treatment of waivers, exemptions, and pilot program applications states that:

> [u]pon receipt of an exemption request, the Secretary [FHWA] shall publish in the Federal Register a notice explaining the request that has been filed and shall give the public an opportunity to inspect the safety analysis and any other relevant information known to the Secretary and to comment on the request.

49 U.S. C. § 3 13 15(4)(A). There is no mention that any determination or "preliminary" determination should be made by the Secretary or FHWA after receiving the request and prior to obtaining public comment.[2] The statutory section that immediately follows, which governs the granting of requests for waivers, exemptions, and pilot programs, clearly indicates that the granting of such a request is subsequent to the publication of notice and opportunity for public comment. 3 1315(4)(B). Thus, as a matter of statutory construction, as well as procedural due process, FHWA should not undertake to make "preliminary" determinations of requests for waivers, exemptions, and pilot programs prior to notifying the public of the details of the request and soliciting and evaluating the public comment.

The appropriate procedural approach is for FHWA, after screening applications for waivers, exemptions and pilot programs to ensure that they are complete, to publish such petitions (or summary information) in the *Federal Register* and request public comment without having made a prior determination (whether preliminary or otherwise) as to the merits of the application.[3] The agency personnel in charge of determining whether to grant or deny requests for waivers, exemptions, and pilot programs should not pre-determine the outcome before evaluating public comment on the request. Legal requirements mandate, and concern for fundamental fairness dictates, that FHWA retreat from making any judgment as to the merits of a petition seeking a waiver, exemption, or pilot program until after the public has been fairly accorded the required notice and opportunity for comment.

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[2] Indeed, the words "[u]pon receipt" imply that publication of a notice in the Federal Register, accompanied by the mandated opportunity for public comment, should occur promptly after receipt of the exemption application and does not allow for a review of the request on the merits.

[3] Another modal administration within the Department of Transportation provides a shining example of how this procedure can be conducted in a proper and fair manner. The National Highway Traffic Safety Administration (NHTSA) frequently receives petitions requesting exemption, pursuant to 49 U.S.C. § 30118(d), from the requirements for notification and remedy of defects and noncompliance under 49 U.S.C. §§ 30118 & 30120. NHTSA invariably publishes the application for a decision of inconsequential noncompliance and requests public comment without making an initial or preliminary determination of the merits of the application. For example, in a recent application for a decision of inconsequential noncompliance, NHTSA stated that "[t]his notice of receipt of an application is published under 49 U.S.C. 30118 and 30120 *and does not represent any agency decision or other exercise of judgment concerning the merits of the application*." 64 Fed. Reg. 27032 col. 2 (May 18, 1999) (emphasis supplied). This typifies NHTSA's treatment of the plethora of exemption applications handled by the agency annually, and provides a fair and unbiased means of making determinations on the merits of each application.

4) Although it is not argued by FHWA[4] in this particular notice, the agency has asserted in several other regulatory notices that it has more flexibility to grant exemptions under current law than it did to grant exemptions under prior law. See, e.g., 64 Fed. Reg. 27025 (May 18, 1999); 63 Fed. Reg. 67600 (Dec. 8, 1998).[5] Advocates disagrees with the agency's view on this issue and its interpretation of the controlling law.

The current law on exemptions permits granting an exemption if that exemption "would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." 49 U.S.C. § 3 13 15(b)(1). FHWA believes that Congress "changed the statutory standard to give the agency greater discretion to consider exemptions." 64 Fed. Reg. 27025 (1999). Indeed, the agency interprets the term "equivalent" to allow for a "more equitable resolution of such matters." *Id.* There is no basis in fact or law for this view.

The level of safety required in order for the Secretary of Transportation to grant waivers and exemptions is governed by the statutory language contained in section 4007 of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107 (1998) (codified at 49 U.S. C. § 3 13 15). The statute requires that the Secretary, prior to issuing waivers and exemptions, determine whether granting a waiver or exemption "is likely to achieve a level of safety **that is equivalent to or greater than,** the level of safety that would have been achieved" absent the waiver or exemption. 49 U. S .C. § 3 13 15 (a) & (b)(1) (emphasis added).[6] By its express terms, the law requires the Secretary, based on evidence in the record, to find that any waiver or exemption will not reduce safety, but will achieve a safety result that is equal to or greater than the level of safety that would have been experienced had the waiver or exemption not been granted.

This statutory language of equivalent or greater safety sets a very high standard that is no less stringent than the previous statutory standard which required that waivers be consistent with safety. See 49 U.S.C. § 31136(e) (1997). The standard of safety in section 31515 (a) & (b) is not a lower or more flexible standard than the prior legislative mandate that waivers must

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[4] We realize that while this notice is issued by FHWA, the contents represents the work and recommendations of the Office of Motor Carriers and Highway Safety.

[5] See comments filed by Advocates for Highway and Auto Safety to DOT Docket Nos FHWA-99-5473 (filed June 17, 1999), and FHWA-98-4 145 (filed Feb. 8, 1999), respectively.

[6] In order to grant a waiver the Secretary must also find that it is in the public interest. 49 U. S .C , § 3 13 15(a).

be "consistent with . . . the safe operation of commercial motor vehicles."[7] The express wording of section 3 13 15 requires a degree or level of safety that is at least equal to the degree or level of safety that existed prior to the granting of the waiver or exemption, i.e., no reduction in safety is countenanced. Any attempt to gloss the standard of safety established in section 3 13 15 as a less demanding safety standard than the prior waiver standard is a misinterpretation of the unambiguously clear statutory language.

The FHWA relies on legislative history addressing section 3 13 15 asserting that "Congress changed the statutory standard to give the agency greater discretion to consider exemptions." 64 Fed. Reg. 27025. According to the agency's reasoning, requiring that an "'equivalent' level of safety be achieved by the exemption, [ ] would allow for more equitable resolution of such matters, while ensuring safety standards are maintained." *Id., citing* H.R. Conf. Rep. No. 105-550, 105th Cong . , 2d Sess. 489 (1998). This legislative history asserts that "[t]o deal with the [court's] decision, this section substitutes the term "equivalent" to describe a reasonable expectation that safety will not be compromised." *Id.* Neither these statements by the agency, nor the cited legislative history, support the agency's interpretation that section 3 13 15 reflects a lower or more flexible standard.

The plain meaning of the statutory language is unambiguous. The statutory standard, that an "exemption would likely *achieve a level* ***of safety*** *that is equivalent to, or greater than, the level* ***of safety*** *that would be obtained in the absence* ***of*** *the waiver,"* requires no elucidation. 3 13 15(b)(1) (emphasis added). The term 'equivalent' indicates a condition which is "equal in force, amount, or value" and is "corresponding or virtually identical esp. in effect or function."[8] Nothing whatever in the use of the word 'equivalent' in section 3 13 15, as a substitute for the expression 'consistent with' used in the prior statutory provision, can be distorted to connote or imply any increased flexibility, diminution, or other abridgement of the enacted safety standard for granting and administering waivers and exemptions. Where Congress has addressed the issue in clear and unambiguous terms that ends the inquiry. See *Chevron U.S.A., Inc., v. N.R.D.C., 467* U.S. 837 (1984).

Even if the standard set forth in section 3 13 15 were not clear and unambiguous, reliance on the legislative history in this instance is unavailing. First, the statute makes no reference to providing a more flexible safety standard than had existed in the past. While "legislative history may give meaning to ambiguous statutory provisions, courts have no

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[7] Indeed, the language of the prior waiver provision, that a waiver must be "consistent with the public interest and the safe operation of commercial motor vehicles," (49 U.S.C. § 3 1136(e) (1997)), provides a less strict safety standard than the current statutory terminology.

[8] See Webster's New Collegiate Dictionary (197 1).

authority to *enforce* alleged principles gleaned solely from legislative history that has no statutory reference point." *International Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO, v. N.L.R.B.,* 814 F.2d 697, 699 (D.C. Cir. 1987) (emphasis in original). Second, the cited legislative history relied on by FHWA in its interpretation of the statute is taken from the Senate amendment to the original House bill, but was not restated in the Conference substitute adopted with enactment of TEA-21 and, as such, is not the applicable legislative history accompanying the law.[9] See H.R. Conf. Rep. 105-550 at 490-91. Indeed, the Conference legislative history makes no mention of granting greater discretion to the Secretary to grant waivers and exemptions nor does it reflect any intent to overturn a judicial decision. Therefore, the legislative history relied on by the agency is not authoritative. To the extent that the legislative history openly conflicts with and contradicts the will and purpose of Congress as clearly expressed in the statute, the legislative history carries no legal weight or analytic value at all. Finally, according to the legislative history relied on by the agency for its reasoning, the term 'equivalent' was selected by Congress for exactly the contrary purpose espoused by the agency, *viz.,* to provide "a reasonable expectation **that safety will not be compromised."** H.R. Conf. Rep. 105-550 at 489 (emphasis added)." Thus, reliance on the appropriate conference report language actually bolsters the clear and unambiguous meaning of the statute that no decrease in safety is contemplated.

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[9] It is evident, from an examination of the wording of the Senate amendment when compared with the provision enacted by Congress, that the report language which accompanied the Senate amendment is not applicable to section 3 13 15. The wording of the Senate amendment did not extend the scope of an exemption to applications by individuals, but was "limited to a class of persons, vehicles or circumstances." H.R. Conf. Rep. 105-550 at 490. The statute as enacted, however, allows for exemptions to be granted to "a person or a class of persons." 49 U.S.C. § 3 13 15(b)(1). Thus, Congress did not adopt the Senate amendment -- and cannot be said to have adopted, by its silence, a gloss contained in legislative report language accompanying an amendment that was not enacted into law.

[10] In fact, the rigorous controls of section 3 13 15 are a paradigm shift in the level of procedural adequacy required to be observed by FHWA and the Office of Motor Carriers and Highway Safety in reviewing the legitimacy of and for awarding waivers and exemptions.